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In the Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PRESIDENT AND THE CHANCELLORS OF THE UNIVERSITY OF CALIFORNIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CHARLES F. ROBINSON
KAREN J. PETRULAKIS
MARGARET L. WU
ELISABETH C. YAP
UNIVERSITY OF CALIFORNIA
OFFICE OF THE
GENERAL COUNSEL
1111 Franklin Street, 8th Fl.
Oakland, CA 94607

BRADLEY S. PHILLIPS
Counsel of Record
JOHN F. MULLER
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Brad.Phillips@mto.com

Counsel for Amici Curiae

(Additional Counsel on Signature Page)

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are the President and Chancellors of the University of California ("UC"). UC is the largest highly selective institution of higher education in the United States. Its ten campuses are located throughout California and provide undergraduate, graduate, and professional education to more than 246,000 students. UC is led by its President and the Chancellors of each of its campuses, all of whom join this brief.[2]

UC is committed to serving the educational needs of the people of California, the most diverse state in the nation. In 2012, California's high-school graduates were 30.5 percent white, 46.2 percent Latino, 13.6 percent Asian or Pacific Islander, 6.7 percent African American, and 0.7 percent American Indian.[3] UC's admissions policy "seeks to enroll, on each of its campuses, a student body that, beyond meeting the University's eligibility requirements, demonstrates high academic achievement or exceptional personal

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[1] The parties have consented to the filing of this brief. No party to this case or their counsel authored this brief in whole or in part, and no person other than amici and their counsel paid for or made a monetary contribution toward the preparation or submission of this brief.

[2] A full list of *Amici* is included in the Appendix.

[3] *See* California Department of Education, Educational Demographics Unit, *Graduates by Ethnicity for 2011-12* ("*High School Graduates Data Set*"), http://dq.cde.ca.gov/dataquest/GraduateReporting/GraduatesByEth.aspx?cTopic=Graduates&cChoice=StGrdbyEt&cYear=2011-12&level=State&cType=All&cGender=B&cGroup=G12.

talent, and that encompasses the broad diversity of cultural, racial, geographic, and socioeconomic backgrounds characteristic of California."[4]

It is the policy of UC that there is "a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups."[5] UC recognizes that "[t]he knowledge that the University of California is open to qualified students from all groups, and thus serves all parts of the community equitably, helps sustain the social fabric of the State."[6] UC's policies further recognize the educational importance, not just of having diverse students on campus, but of ensuring meaningful interactions among them.[7] And UC provides a compelling illustration of the broader educational context in which race-neutral and race-conscious policies must be evaluated.

UC is central to the national debate over policies governing admission of underrepresented minority students to public universities. In 1996, California amended its state constitution to prohibit race-

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[4] University of California, *Regents Policy 2102: Policy on Undergraduate Admissions* (adopted May 20, 1988), http://regents.universityofcalifornia.edu/governance/policies/2102.html.

[5] Regents of the University of California *Regents Policy 4400: Policy on University of California Diversity Statement* (amended Sept. 16, 2010) ("*Regents' Policy 4400*), http://regents.universityofcalifornia.edu/governance/policies/4400.html.

[6] *Id.*

[7] *Id.*

conscious measures in college admissions. As this Court has recognized, that prohibition led UC to "experiment[] with a wide variety of alternative approaches" for promoting diversity and ensuring access for qualified underrepresented minorities. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Those efforts have proven to be ineffective alternatives, as *Amici* explain in detail below. UC's experience thus sheds light on the practical obstacles faced by universities that seek to promote diversity, while also furthering other crucial educational objectives, but are barred from any use of race as a factor in admission decisions.

SUMMARY OF ARGUMENT

UC is uniquely situated to provide empirical context that will assist the Court in its analysis of the issues in this case. UC's experience demonstrates three basic points.

First, universities have a compelling and viable interest in pursuing *qualitative* diversity within their student bodies, meaning a student body that includes students of varying backgrounds across many characteristics, including but not limited to race. This form of diversity differs from merely quantitative diversity in two key respects: it requires meaningful interactions among diverse students, not merely the presence of certain numbers of students, and it requires diversity within racial groups across other personal characteristics.

Second, UC's many years of effort and experimentation with a wide variety of race-neutral approaches demonstrates that, at least under current circumstances in California, highly competitive public

universities cannot maintain historic levels of diversity within their student bodies—much less reflect in their student bodies a growing state population of underrepresented minorities—using only race-neutral methods.

Third, because universities have constitutionally cognizable and educationally crucial interests other than racial diversity, any evaluation of admissions policies, whether race-neutral or not, must take into account whether the policies in question sufficiently advance those other educational interests.

ARGUMENT

I. QUALITATIVE DIVERSITY IS A COMPELLING INTEREST THAT IS PROPERLY THE FOCUS OF THE COURT'S NARROW-TAILORING ANALYSIS

As this Court held in *Grutter*, "obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *Grutter*, 539 U.S. at 325). In *Fisher*, Petitioner did not ask the Court to revisit *Grutter*'s holding that qualitative diversity is a compelling government interest. *Id.* at 2419; *see also id.* at 2422 (Scalia, J., concurring). Petitioner also does not make such a request here. Instead, Petitioner mounts a circuitous attack on the Court's holding that qualitative diversity is a compelling interest by mischaracterizing the Court's precedents on narrow tailoring. This "mask[ed] . . . attempt" to eviscerate the Court's holding with respect to qualitative

diversity should be rejected. *Cf. Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

A. UC's Experience Corroborates *Grutter*'s Insight and Established Empirical Evidence that the Educational Benefits of Diversity are Realized Primarily Through Meaningful Interactions Among Students of Different Backgrounds

A university's compelling interest in diversity, this Court has held, is defined by "the educational benefits that flow from a diverse student body." *Fisher*, 133 S. Ct. at 2417; *see also Grutter*, 539 U.S. at 329-30. "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" *Fisher*, 133 S. Ct. at 2419 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)). "That would amount to outright racial balancing," which the Court has held is "patently unconstitutional." *Id.* (quoting *Grutter*, 539 U.S. at 330). Instead, obtaining the "substantial" educational benefits of diversity, *Grutter*, 539 U.S. at 330, requires qualitative diversity: creating an educational community that fosters those benefits by supporting meaningful interactions among diverse students.

UC's policies and experience reflect and support this conclusion. The University's Diversity Statement, last amended in 2010, provides that "[d]iversity aims to broaden and deepen both the educational experience and the scholarly environment, as students and faculty *learn to interact*

effectively with each other, preparing them to participate in an increasingly complex and pluralistic society."[8] A pair of reports on diversity, prepared for the Regents in 2007 and 2010, found that the benefits of diversity at UC arose from "the quality and extent of interaction between diverse groups and individuals."[9] These studies emphasized the importance of these interactions for "[c]ampus climate," a "measure of the real or perceived quality of interpersonal, academic, and professional interactions on a campus."[10] Statements on diversity by individual campuses further underscore these priorities.[11] UC's recognition of the importance of meaningful interaction among diverse students is compellingly supported by both this Court's opinions and empirical evidence.

1. Students of Different Races and Backgrounds Contribute Diverse Viewpoints and Perspectives

As Justice Kennedy has observed, "[t]he enduring hope is that race should not matter; the reality is that

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[8] *Regents Policy 4400* (emphasis added).

[9] Study Group on University Diversity, *Overview Report to the Regents* 6 (2007), http://www.ucop.edu/student-affairs/_files/diversityreport0907.pdf.

[10] *Id.* at 12; *see also* University of California, *Diversity Annual Accountability Sub-Report* 2-3 (2010), http://regents.universityofcalifornia.edu/regmeet/sept10/j1attach.pdf.

[11] *See, e.g.*, *Pathway to Excellence: UC Berkeley Strategic Plan for Equity, Inclusion, and Diversity* 8-9 (2009), http://diversity.berkeley.edu/sites/default/files/SPEID_FINAL_webversion.pdf; *UCLA Principles of Community* 1 (2011), https://diversity.ucla.edu/ucla-principles-of-community.pdf.

too often it does." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). Because race still matters in so many spheres of life, it is not surprising that a person's race tends to inform his or her identity, experiences, and perspectives. *See Grutter*, 539 U.S. at 333 ("one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" "is likely to affect an individual's views"). Minority youth—particularly African-American and Latino children—are disproportionately likely to attend segregated schools, suffer more severe school discipline, live in poverty, and have relatives in the criminal justice system. These trends, and the stereotypes they foster, render minority youths—even those who have not experienced such hardships—more likely than others to be sensitized to racial disparities in society.

To be sure, individuals of any given race will have varied experiences and a wide range of perspectives. *See Grutter*, 539 U.S. at 333. One student of color may have a parent, friend, or relative in jail and develop strong views, of whatever valence, regarding criminal justice and punishment. Another may have parents who have never received so much as a traffic ticket; she may feel frustrated or stigmatized by a prison system filled disproportionately with racial minorities or by media portrayals that correlate race and crime. A third student of color may study law or law enforcement in order to break down stereotypes and combat disparities in incarceration rates. A fourth may be focused on pursuing her dream of becoming a doctor and be indifferent to criminal justice issues. For each, the "unique experience of being a racial minority in [our] society" has the potential to enrich classroom and dormitory

discussion and the exchange of ideas within a university and to affect what research is performed and which solutions are considered. *Id.* Collectively, these different experiences also help students "learn there is no 'minority viewpoint,' but rather a variety of viewpoints among minority students." *Id.* at 320.

Students' interactions with peers of different racial backgrounds may reveal more similarities than differences. Students of different races will sometimes discover that they have far more in common than they anticipated. *See* Sylvia Hurtado, *Preparing College Students for a Diverse Democracy: Final Report to the U.S. Department of Education* 37-38 (Univ. of Mich., Ctr. for the Study of Higher & Postsecondary Educ. 2003) [hereinafter *Preparing College Students*]. Discovery of such similarities is just as important as exposure to different opinions, as it "promotes 'cross-racial understanding' [and] helps to break down racial stereotypes." *Grutter*, 539 U.S. at 330; *see also Preparing College Students*, *supra*, at 37 (explaining that realization of "commonalities" in cross-racial interaction can "facilitate self-reflection about [students'] own assumptions").

2. Empirical Evidence Shows That Diversity Yields Important Educational Benefits When Meaningful Cross-Racial Interactions Occur

Powerful empirical evidence, consistent with UC's experience, shows that, when accompanied by meaningful cross-racial interactions, diversity yields substantial educational benefits. *Cf. Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) ("[this Court's] precedents provide a basis for the Court's

acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence"). The benefits fall loosely into two categories: improved learning outcomes and improved preparation for work and citizenship.

(a) Learning Outcomes

In *Grutter*, this Court recognized that "numerous studies show that student body diversity promotes learning outcomes." *Grutter*, 539 U.S. at 330. *See also Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (diversity promotes "[t]he atmosphere of 'speculation, experiment, and creation' . . . [that is] so essential to the quality of higher education.").

These benefits find substantial support in the empirical literature. Students' informal and curricular interactions with diverse peers is "positively associated with a wide range of student outcomes in the higher education context, including improving academic skills; academic and social self-concept; cognitive outcomes; personal growth/development; teamwork and leadership skills; prejudice reduction; . . . perceived exposure to diverse ideas; racial/cultural understanding and engagement; pluralistic orientation; social agency and civic development; retention; well-being; and satisfaction with college." *See* Mitchell James Chang, *Quality Matters: Achieving Benefits Associated With Racial Diversity* 11-12 (Kirwan Institute 2011) (listing studies); Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 620-21 (2008) (same). Evidence indicates that

personal interactions with students of diverse races promote cognitive growth and that the positive effects of such interactions are greater than the effects of either formal instruction about diversity or interactions with students who are diverse only in respects other than race. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development*, 80 Rev. Educ. Res. 4, 20-22 (2010).

(b) Professionalism and Citizenship

Grutter also recognized that diversity furthers the "overriding" educational goal "of preparing students for work and citizenship." *Grutter*, 539 U.S. at 331. Students who experience a racially diverse educational environment are better prepared for success in the workforce, because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. These students discover that there is not "some characteristic minority viewpoint on any issue," which in turn "diminish[es] the force of [racial] stereotypes." *Id.* at 333 (internal quotation marks omitted). Learning in a diverse environment "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Id.* at 330 (alteration in original) (citation omitted). This Court's precedents also recognize that student-body diversity helps facilitate diverse leadership within society, because universities "represent the training ground for a large number of our Nation's leaders," *id.* at 332, and leaders must be "expos[ed] to the ideas and mores of students as diverse as this Nation of many peoples," *Bakke*, 438 U.S. at 313 (opinion of

Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Numerous studies have confirmed that cross-racial interaction increases students' professional competency by improving their ability to see the world from others' perspectives, fostering openness to opposing viewpoints, reducing prejudice, increasing tolerance of others with different beliefs, improving their ability to negotiate controversial issues, and enhancing their social self-confidence. *See, e.g.*, Jayakumar, *supra*, at 641; *see also* Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation*, 48 Res. Higher Educ. 283, 310-312 (2007) (finding diversity experiences in college are key to achieving students' workforce preparation); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes* 72 Harv. Educ. Rev. 330, 361 (2002) (same).

B. Consistent with UC's Policies and Experience, Qualitative Diversity is a Proper Goal for Narrow Tailoring

This Court has affirmed and reaffirmed that the use of race must be "narrowly tailored to further compelling governmental interests." *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 326). Petitioner contends qualitative diversity "lacks the requisite clarity" to survive this narrow-tailoring inquiry. Pet. Br. at 25. This argument misconceives the Court's narrow-tailoring precedents as well as the diversity interest recognized in *Grutter*.

1. Qualitative Diversity is Sufficiently Specific for Narrow Tailoring

As this Court's precedents make clear, the narrow-tailoring inquiry takes as given that universities have a compelling interest in qualitative diversity. *See Fisher*, 133 S. Ct. at 2419-20 ("Once [a] University has established that its goal of diversity" is a compelling government interest, the inquiry turns to whether "the means chosen by the University to attain diversity are narrowly tailored to that goal.") The Court has set out two principles to guide this inquiry.

First, the university must show that its admissions processes are individualized such that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 2420. This principle reflects the Court's admonition that quotas are impermissible. *See Grutter*, 539 U.S. at 334. At the same time, it also reflects the Court's guidance that numbers cannot be ignored. *Id.* at 336 ("[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota." (internal quotation marks omitted)). A university cannot hope to foster meaningful interactions among diverse students without a sufficient number of enrolled minority students. *Id.* at 340. At bottom, this principle safeguards that universities use racial classifications only as "part of a broader assessment of diversity." *Parents Involved*, 551 U.S. at 723.

Second, a reviewing court must be "satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420. This principle ensures that the "educational

benefits of diversity" obtained through an individualized, race-conscious admissions program could not be achieved by less restrictive means. *Id.* The Court has made clear that this requirement "does not require exhaustion of every *conceivable* race-neutral alternative." *Id.* (quoting *Grutter*, 539 U.S. at 339-40). Instead, it requires that "no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.* A potential race-neutral alternative must promote the educational benefits of qualitative diversity "about as well" as the race-conscious admissions program and "at tolerable administrative expense." *Id.* (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)).

The compelling interest in diversity recognized in *Grutter* is sufficiently specific to be the subject of this narrow-tailoring analysis. The first requirement, that race-conscious admissions programs be individualized, requires no more specificity with respect to the government's interest. This requirement forbids admissions policies for which an applicant's race overshadows the applicant's remaining characteristics. The second requirement, that universities exhaust workable race-neutral alternatives, also does not demand a more specific definition of diversity than this Court's precedents provide. In assessing race-neutral alternatives, courts and universities simply must compare the educational benefits achieved by otherwise appropriate race-conscious admissions policies alongside the educational benefits that would be achieved by viable race-neutral policies. This inquiry does not call for universities to designate a numeric point at which they will have reached qualitative diversity. It calls for a qualitative comparison of the

educational benefits achieved under race-conscious and race-neutral policies.

Indeed, the Court has expressly found qualitative diversity sufficiently specific to be the subject of its narrow-tailoring inquiry. In *Grutter*, the Court held the University of Michigan Law School's affirmative action plan was narrowly tailored to serve that interest. *Grutter*, 539 U.S. at 335. And in *Gratz*, applying the same narrow-tailoring inquiry to the same diversity interest, the Court did not find a more specific articulation of that interest necessary. *Gratz v. Bollinger*, 539 U.S. 244, 271-74 (2003).

2. Requiring Universities To Define Diversity More Narrowly Would Prevent Them from Achieving the Kind of Diversity Essential to the Educational Process

Petitioner claims that UT has failed to "clearly describe" the diversity interest it seeks to advance. Pet. Br. at 26-27. This argument inverts the narrow-tailoring inquiry recognized by this Court's precedents and ignores the Court's holdings regarding a university's compelling interest in diversity. It would render strict scrutiny "strict in theory, but fatal in fact." *Cf. Fisher*, 133 S. Ct. at 2421 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)).

Petitioner purports to derive this requirement of greater clarity from a restatement, in *Fisher*, of *Bakke*'s strict scrutiny standard. Pet. Br. at 29; *Fisher*, 133 S. Ct. at 2418 ("Strict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the

classification is necessary . . . to the accomplishment of its purpose.'" (quoting *Bakke*, 438 U.S. at 305 (opinion of Powell, J.)). *Fisher* did not, however, hold that universities must articulate the government's interest in diversity with any more specificity than the Court had done in *Grutter*. Indeed, as explained above, the narrow-tailoring analysis set out in *Fisher* takes as given *Grutter*'s definition of the compelling interest in diversity.

The diversity interest asserted by UT in this case is the same: qualitative diversity that furthers the educational interests set out in *Grutter*. Yet Petitioner asks the Court to require universities to define their interests in diversity more narrowly than the Court itself has done. This argument amounts to a request that the Court, by redefining the narrow-tailoring inquiry employed in *Grutter* and *Gratz* and reaffirmed in *Fisher*, effectively overrule *Grutter*'s holding that qualitative diversity is a compelling government interest. *Grutter*'s holding would lose all force if universities were required to articulate a narrower, purely quantitative interest in order to satisfy the narrow-tailoring inquiry.

In *Grutter*, the Court had good reason to resist defining a university's compelling interest more narrowly. The diversity interest that may be served by race-conscious admissions programs is nuanced. *Grutter* recognizes that qualitative diversity within a university can be achieved only if that educational community is broadly reflective of the larger community. But *Grutter* also recognizes that an effort simply to mirror the numeric composition of the broader community would impermissibly prioritize race above other characteristics. The Court's definition of qualitative diversity is therefore at just

the right level of specificity: more detailed requirements of specific diversity goals would lead ineluctably toward unconstitutional quotas, contrary to the Court's clear commands.

Indeed, Petitioner explicitly asks that UT be required to define its interest based on purely numerical goals, arguing that UT failed to provide "concrete targets for admitting more minority students" in service of the university's interest in qualitative diversity. Pet. Br. at 29 (quoting *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 669 (5th Cir. 2014) (Garza, J., dissenting)). Petitioner advances these numerical targets as a means of measuring whether UT's diversity interest has been "achieved." But this formulation again mischaracterizes this Court's narrow-tailoring inquiry and threatens to make strict scrutiny "fatal in fact." The Court does not and should not ask whether a university has satisfied its interest in diversity based merely on numbers. Such an inquiry would make no sense, both because it is premised on an incorrect, purely quantitative understanding of a university's diversity interest and because it effectively asks whether admissions policies have met unconstitutional quotas.

II. UC'S EXPERIENCE SHOWS THAT A PROHIBITION ON CONSIDERING RACE IN ADMISSIONS CAN IMPEDE PUBLIC UNIVERSITIES FROM ACHIEVING DIVERSE STUDENT BODIES

Amici are intimately familiar with the challenges that face a large and highly selective university when it is barred from considering race in its admissions decisions. Over the more than seventeen years since

California's constitutional ban on affirmative action went into effect, UC has experimented with a wide array of race-neutral initiatives aimed at promoting diversity. Overall, these efforts have not been effective alternatives to UC's race-conscious admissions program. The undergraduate student populations at UC's most selective campuses (Berkeley and UCLA) are markedly less racially diverse today than they were in the mid-1990s. Enrollment of racial minorities system-wide continues to lag far behind California's population—even as UC has expanded overall enrollment on many of its campuses.

A. UC and Its Admissions Process

UC is the largest highly selective institution of higher education in the United States, and, in many respects, comparable to UT. UC's ten campuses provide undergraduate, graduate, and professional education to more than 246,000 students. Six of UC's nine undergraduate campuses are ranked among the top eleven public schools in the nation.[12] UC also operates the nation's largest health training program—including six schools of medicine—which educates over 14,000 students annually.[13]

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[12] *See* U.S. News and World Report, *Top Public Schools* ("*Top Public Schools*"), http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public?int=a557e6. UC's tenth campus, UC San Francisco, provides only graduate and professional degree programs in the health sciences.

[13] University of California, Office of the President, *UC Health*, http://www.ucop.edu/uc-health/.

Applications for undergraduate admission to UC are reviewed in a two-level process. At the highest level, UC considers an applicant's qualification for admission to the University as a whole. Consistent with California's Master Plan for Higher Education, UC seeks to admit freshmen from the top 12.5 percent of California public-high-school graduates.[14] Applicants must satisfy minimum eligibility requirements. For example, applicants must have completed at least fifteen yearlong college preparatory courses; have a high-school GPA of 3.0 or higher in their college-preparatory courses; and take the SAT or ACT (with Writing) admissions tests.[15] Satisfying these criteria guarantees that an applicant will be considered for admission. Applicants whose GPAs and test scores put them in the top 9% of California high-school students are guaranteed a place at UC—although not necessarily at the campus of their choice. These requirements for admission to UC are race-neutral and have always been so.

At the second level, applicants are considered for admission to specific campuses. Applications for admission from UC-eligible students exceed the maximum enrollment capacity at most of UC's nine undergraduate campuses. As a result, the campuses

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[14] *A Master Plan for Higher Education in California* (1960-1975) 4, 73 (1960), http://www.ucop.edu/acadinit/mastplan/MasterPlan1960.pdf.

[15] The Regents of the University of California, *Regents Policy 2103: Policy on Undergraduate Admissions Requirements* (June 18, 1982, as amended Feb. 5, 2009) ("*Regents Policy 2103*"), http://regents.universityofcalifornia.edu/governance/policies/2103.html.

have developed their own selection criteria, such as GPA, test scores, and other indicia of academic promise. Beginning in the 1960s and until 1997, individual campuses employed, in various ways, criteria that included an applicant's race.

B. Proposition 209 Dramatically Reduced Diversity on UC Campuses

Proposition 209 amended the California Constitution to provide that UC, among other State entities, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31, subd. (a). The fall 1998 UC freshman class was the first to reflect this ban on race-conscious admissions policies.

The abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at UC.[16] On every UC campus, the

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[16] University of California, Office of the President, Student Academic Services, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* at 17, 19, 22 (Mar. 2003) ("*Undergraduate Access to UC*"), http://files.eric.ed.gov/fulltext/ED476308.pdf. The University of California considers students to be "underrepresented" based on their collective rates of achieving eligibility for the University. Underrepresented minorities include Latinos/Chicanos (referred to herein as "Latinos"), African Americans, and American Indians. *Id.* at 1 n.3.

percentage of applicants who were underrepresented minorities declined, as did the admission rates for underrepresented-minority students and the percentage of such students among the admitted class.[17] These declines were especially pronounced at the most sought-after campuses and less severe at other campuses, which enrolled many underrepresented minorities who would previously have been admitted to the more selective campuses.

At Berkeley, the top-ranked public school in the nation,[18] the proportion of applicants who were underrepresented minorities fell from 18.9 percent to 16.0 percent between 1995 and 1998.[19] During the same period, the admission rate for these students plummeted from 54.6 percent to 20.2 percent.[20] The percentage of underrepresented-minority students in Berkeley's entering class fell from 24.3 percent in 1995 (807 students) to 11.2 percent in 1998 (412 students).[21]

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[17] *Id.*

[18] *Top Public Schools.*

[19] *Undergraduate Access to UC* at 15. *Amici* use 1995 as their basis for comparison with the post-Proposition 209 statistics. The incoming class of 1996 represented the first freshman class after the University restricted the use of race and ethnicity in UC admissions by adopting SP-1. While the 1998 class was the first class admitted under Proposition 209, the adoption of SP-1 led to reduced rates of applications to the University by underrepresented students in 1996 and 1997. Thus, 1995 is the best comparison year for measuring the effects of the change in admissions policies.

[20] *Id.* at 19.

[21] *Id.* at 22.

At UCLA, the second-ranked public school,[22] Proposition 209 had similarly dramatic effects. The proportion of underrepresented-minority applicants dropped from 22.0 percent to 17.7 percent; their admission rate fell from 52.4 percent to 24.0 percent; and their percentage of the entering class declined from 30.1 percent (1,108 students) to 14.3 percent (597 students).[23]

When viewed separately, each of the underrepresented-minority groups (African Americans, Latinos, and American Indians) experienced declines in its percentage of the applicant pool and the admitted pool for California-resident students on every campus. At most campuses, the percentage of these minority groups in the entering class declined sharply.[24] The experience of African-American and Latino students at Berkeley and UCLA was particularly striking. African Americans made up 6.7 percent and 7.4 percent of the entering classes at these campuses in 1995. By 1998, those numbers were 3.7 percent and 3.5 percent. In 1995, Latinos were 16.9 percent of freshmen at Berkeley and 22.4 percent at UCLA. Three years

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[22] *Top Public Schools.*

[23] *Undergraduate Access to UC* at 17, 19; *see id* at 22.

[24] University of California, *Application, Admissions and Enrollment of California Resident Freshman for Fall 1995 through 2014* at 1 ("*Application, Admissions, and Enrollment*"), http://www.ucop.edu/news/factsheets/2014/flow-frosh-ca-14.pdf.

later, they represented just 8.0 percent and 11.0 percent.[25]

C. The University's Race-Neutral Admissions Initiatives Have Proven Ineffective Alternatives

In the face of these daunting statistics, UC embarked on a broad effort to increase diversity through race-neutral initiatives. While this effort produced some benefits, the bottom line is that today—more than seventeen years after passage of Proposition 209—the enrollment rates for underrepresented minorities still have not rebounded at UC's most selective campuses, and the overall enrollment figures at UC have not kept pace with the demographic changes in California.

1. *Outreach Task Force.* Before Proposition 209 became effective, UC recognized that it was necessary "to take relevant actions to develop and support programs which will have the effect of increasing the eligibility rate of groups which are 'underrepresented' in the university's pool of applicants as compared to their percentages in California's graduating high school classes."[26] UC created an Outreach Task Force charged with developing a comprehensive approach for reversing low eligibility rates for students from underrepresented groups and addressing the

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[25] *Id.* at 2, 5. These figures are for California-resident freshmen only.

[26] *Text of UC Regents' Resolutions, Policy Ensuring Equal Treatment Admissions, (SP-1)* (1995). http://www.berkeley.edu/news/berkeleyan/1995/0830/text.html.

challenges those students faced in gaining admission to the most selective UC campuses.[27]

In 1997, the Outreach Task Force recommended a strategy that included: (i) partnerships between UC campuses and public schools aimed at improving opportunities for college preparation and fostering positive academic cultures; (ii) expanded academic-development programs for K-12 students; (iii) informational outreach to students, families, teachers, and counselors geared towards improving planning and preparation for college; and (iv) research to identify the cause of the lack of diversity and evaluate the effectiveness of UC's outreach programs.[28]

Consistent with these recommendations, UC has spent more than half of a billion dollars since 1998 to build and expand race-neutral programs aimed at educationally disadvantaged K-12 students, and it has substantially increased the percentage of the applicant pool who participate in such programs.[29] There are currently thirteen such programs, which collectively reach students in more than 1,800 K-12 public schools and all 113 community colleges in

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[27] *See id.* § 1.

[28] University of California Outreach Task Force *New Directions for Outreach* 3-4 (July 1997), http://www.ucop.edu/education-partnerships/_files/outreachrpt.pdf.

[29] University of California, *Budget for Current Operations: Summary & Detail 2015-16*, at 213 (December 2014), http://www.ucop.edu/operating-budget/_files/rbudget/2015-16budgetforcurrentoperations_.pdf.

California.[30] More than 77 percent of the students in the three largest outreach programs are underrepresented minorities.[31]

2. *Eligibility in the Local Context*. Beginning with students applying for the 2001 entering class, UC modified its eligibility policy. The top 4 percent of eligible students in each California public-high-school class were designated as "Eligible in the Local Context" ("ELC"). The ELC program was expanded to the top 9 percent of students for the 2012 entering class.[32] ELC status guarantees admission to one of the nine undergraduate campuses, space permitting, and is one of the criteria that individual campuses must consider in evaluating each application.

3. *Changes in Admissions Criteria*. UC has revised its admissions criteria substantially in the years since Proposition 209 was implemented. In 2001, UC abandoned a rigid requirement that more than half of the class must be admitted solely on the basis of a narrow range of academic criteria and recommended that campuses instead evaluate applicants "using

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[30] *See* University of California, *Report on Student Academic Preparation and Educational Partnerships (SAPEP) for the 2013-14 Annual Report Highlights* 3 (June 2015), http://www.ucop.edu/diversity-engagement/_files/sapep-annual-report-highlights-2015.pdf.

[31] See University of California, *Report on Student Academic Preparation and Educational Partnerships (SAPEP) for the 2013-14 Program Outcomes* 10 (Aug. 2011), http://www.ucop.edu/diversity-engagement/_files/sapep-full-report-rscpsb.pdf.

[32] *Regents Policy 2103*.

multiple measures of achievement and promise."[33] These expanded criteria include not only a student's GPA and test scores, but also the context of her life experience, neighborhood characteristics, qualification for the ELC program, her academic performance relative to the opportunities available in her high school, any recent and marked improvement in academic performance, the nature of the courses taken, outstanding performance in particular areas, and special talents or skills.[34]

4. *Comprehensive and Holistic Review*. UC has also modified the process by which individual applicants are evaluated. UC's "comprehensive review" process specifies that applicants' qualifications be reviewed "in the context" of information about each individual student's educational and personal circumstances.[35] UC has created sophisticated tools such as "read

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[33] The Regents of the University of California, *Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions* (Nov. 15, 2001) (*"Regents Policy 2104"*), http://regents.universityofcalifornia.edu/governance/policies/2104.html.

[34] University of California, *Comprehensive Review*, http://admission.universityofcalifornia.edu/counselors/freshman/comprehensive-review/.

[35] See generally *Guidelines for Implementation of University Policy on Undergraduate Admissions* at 2 (last updated July 20, 2012) ("[M]erit should be assessed in terms of the full range of an applicant's academic and personal achievements and likely contribution to the campus community, viewed in the context of the opportunities and challenges that the applicant has faced."), http://www.ucop.edu/student-affairs/_files/GUIDELINES_FOR_IMPLEMENTATION_OF_UNIVERSITY_POLICY_on_UG_ADM_Revised_July2012.pdf.

sheets," which display an applicant's quantitative data (but not the applicant's race or ethnicity) and compare them with data for other applicants from throughout the State and from the same high school.

In 2011, UC extended comprehensive review by encouraging campuses to use a single holistic score in evaluating applicants.[36] This approach eliminates the use of fixed weights for specific criteria and allows reviewers to exercise more judgment in evaluating an applicant's achievements and potential for academic success. Individual applications are read and scored by multiple independent readers, and those with significant score disparities receive further attention to ensure a fair result.[37]

5. *Use of Standardized Tests.* UC also has sought to reduce its reliance on standardized tests, a policy shift based in part on evidence that test scores were highly influenced by family education and income levels.[38] Indeed, out of concern that requiring

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[36] The Regents of the University of California, *Regents Policy 2108: Resolution Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions* (Jan. 20, 2011), http://regents.universityofcalifornia.edu/governance/policies/2108.html.

[37] *See generally* UC Board of Admissions and Relations with Schools, Systemwide Academic Senate, *Comprehensive Review in Freshman Admissions at the University of California 2003-2009* at 27-29 (May 2010) ("*BOARS Comprehensive Review Report*"), http://senate.universityofcalifornia.edu/reports/HP_MGYreBOARS_CR_rpt.pdf.

[38] *See* Board of Admissions and Relations with Schools, *Admissions Tests and UC Principles for Admissions Testing* at 3-4, 10-11 & n.6, 12, 18 (Dec. 2009),

numerous standardized tests beyond the SAT or ACT might discourage students from educationally disadvantaged families from applying, the University eventually dropped its requirement for SAT-II subject tests altogether.[39]

6. *Campus-Specific Initiatives.* Individual campuses have also adopted their own initiatives. For example, UCLA's SHAPE Project shares information about the application process with underrepresented minorities.[40] Individual campuses also target outreach efforts to particular high schools, geographic areas, and disadvantaged students.[41] Berkeley and UCLA, among other campuses, have K-12 pipeline programs that seek to improve academic preparation in certain underserved communities.[42] They also have programs aimed at increasing transfers from community colleges.[43]

7. *Results of UC's Race-Neutral Initiatives.* Notwithstanding these initiatives, UC has struggled to achieve sufficient diversity in its student

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http://senate.universityofcalifornia.edu/committees/boars/boars.testingrpt.toRegents_000.pdf.

[39] *See* University of California, *Freshman, SAT Subject Tests*, http://admission.universityofcalifornia.edu/freshman/requirements/examination-requirement/SAT-subject-tests/.

[40] University of California, *Guidelines for Addressing Race and Gender Equity in Academic Programs in Compliance with Proposition 209* at 7 (July 2015), http://www.ucop.edu/general-counsel/_files/guidelines-equity.pdf.

[41] *Id.*

[42] *Id.* at 8.

[43] Id.

populations, even as it has added thousands of new undergraduate seats.

To be sure, UC's race-neutral initiatives have produced some benefits. The expanded outreach efforts have helped to drive up enrollment of low-income students and students who will be the first in their families to graduate from college.[44] Students of all ethnicities have taken advantage of these initiatives. This means, however, that the initiatives are necessarily less effective at changing the racial and ethnic composition of UC's student body than policies that target only underrepresented minorities.[45]

The ELC program has succeeded in increasing applications from students at California high schools that have traditionally sent only a small number of students to UC. But, as a result of the racial and ethnic make-up of California's high schools, this shift has not substantially increased the diversity of the

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[44] The primary measure of the proportion of "low-income" students is the percentage of undergraduate recipients of federal Pell Grants. In 2012-13, 42 percent of UC undergraduates qualified to receive Pell Grants. That is twice as high as the proportion of Pell Grant recipients at UC's peer public institutions, and *three or four times* the rate at Ivy League colleges such as Yale (13 percent) and Harvard (10 percent). University of California, *2015 Accountability Report* at Table 2.2.1, ("*2015 Accountability Report*"), http://accountability.universityofcalifornia.edu/2015/documents/pdfs/Acct%20Report%202015%20Web.pdf. The percentage of enrolled students for whom neither parent is a college graduate increased from 36 percent in 1999-2000 to 40 percent in 2011-12. *See id.* at Table 1.2.1.

[45] *Undergraduate Access to UC* at 23-24.

pool of students who are admitted to UC.[46] The effects of the ELC program have been particularly small on UC's most highly selective campuses, such as Berkeley and UCLA. At these campuses, students who qualify for ELC must still compete with tens of thousands of other highly qualified applicants.

Enrollment data in the years since approval of Proposition 209 reflect a persistent inability to meet UC's diversity goals through race-neutral means. System-wide, the percentages of African Americans and American Indians in the enrolled pool of California residents in 2014 (4.0 percent and 0.6 percent, respectively) remained lower than the corresponding percentages in 1995.[47] A faculty committee recently found that admission rates for African Americans remain "far below" those for the racial groups with the highest admit rates on each campus and concluded that "[t]he Comprehensive Review process alone is not sufficient to overcome the disadvantages that African American[s] face in their educational opportunity."[48]

For Latinos, their percentage of the admitted pool of California residents system-wide increased during this period (from 15.8 to 29.4 percent), as did the percentage of the enrolled pool (from 15.6 to 29.3

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[46] *See* Patricia Gandara, *A Case Study in the Loss of Affirmative Action* 13-14 (Aug. 2012), http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action.

[47] Application, Admissions, and Enrollment at 1.

[48] *BOARS Comprehensive Review Report* at 25.

percent).[49] But the growth in the number of Latino students, while substantial, is still far lower than one would expect given that in 2012 Latinos constituted 46.2 percent of high-school graduates in California.

The failure of these race-neutral initiatives to accomplish UC's diversity goals is most apparent at UC's highly selective campuses. Berkeley has experienced dramatic declines in the percentages of its enrolled class that comprise African Americans and American Indians. The 1995 entering class of California residents included 202 African Americans (6.7 percent) and 56 American Indians (1.8 percent). The most recent entering class includes just 110 African Americans (3.6 percent) and 23 American Indians (0.75 percent). Notwithstanding that the percentage of Latino high-school graduates increased by more than half between 1995 and 2014, their percentage of the enrolled class was nearly the same in 2014 (19.4 percent) as it was in 1995 (16.9 percent).[50]

Similarly, at UCLA, the proportion of African Americans in the entering class dropped from 7.4 in 1995 to 5 percent in 2014. American Indians' percentage of the entering class dropped from 1.2 to 0.5 percent. The results for Latino students appear better at first glance: their percentage of the entering class increased from 22.4 to 26.3 percent.[51] But this small increase is dwarfed by the increase in the percentage of California high-school graduates who

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[49] *Application, Admissions, and Enrollment* at 1.

[50] *Id.* at 2.

[51] *Id.* at 5. These data are for California resident freshmen only.

were Latino, from 30.0 percent in 1995 to 46.2 percent in 2012.[52]

D. Declines in Campus Diversity Have Especially Affected the Experiences of Underrepresented-Minority Students

Every two years, UC administers a broad survey of its undergraduate population. The survey asks students whether they agree with the statement that "[s]tudents of my race/ethnicity are respected on this campus."[53] The responses to this question vary widely by campus. At UC's most diverse campuses, Riverside and Merced,[54] African Americans and Latinos report feeling respected at levels that are substantially above the system-wide average.[55] By contrast, at UCLA and Berkeley, where the

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[52] *High School Graduates Data Set*; California Postsecondary Education Commission, *Ethnicity Snapshots Table, High School Graduates* ("*Ethnicity Snapshots Table*"), http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=4&Rpt=AtoG_HS.

[53] 2015 Accountability Report, Indicator 7.4.1.

[54] At Riverside, African Americans are 6.3 percent and Latinos 35.1 percent of the undergraduate population; at Merced, the percentages are 7.5 and 44.1, respectively. Internal UC Data.

[55] Only 13 percent of African Americans at Riverside felt that members of their race were not respected, compared with an average of 35 percent for African Americans systemwide. And just 7 percent of Latinos perceived a lack of respect on the Riverside campus, whereas the systemwide figure was 18 percent. *2015 Accountability Report*, Indicator 7.4.1. At Merced, the percentages were just 12 for African Americans and 4 for Latinos. Internal UC Data.

percentages of African Americans and Latinos are much lower,[56] substantially higher percentages of these students report feeling that students of their race are not respected.[57] These survey data suggest that underrepresented minorities are less likely to feel that they are respected when they represent a disproportionately small percentage of the student population.[58]

The same trend is evident in another broad survey, administered between 2012 and 2013, regarding campus climate. This survey asked students to "rate the overall climate" at their campus for people of color. At Riverside and Merced, African-American and Latino undergraduates report a "very positive" or

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[56] The student body at UCLA is 4.0 percent African American and 19.1 percent Latino; at Berkeley, the percentages are 3.3 and 13.4, respectively. Internal UC Data.

[57] At UCLA, 49 percent of African Americans and 33 percent of Latinos felt that they were not respected. At Berkeley, the percentages were 49 and 29. *2015 Accountability Report*, Indicator 7.4.1. *See generally* William C. Kidder, *Misshaping the River*, 39 J. of College & Univ. L. 53, 56-59 (2013) ("*Misshaping the River*") (analyzing data and comparing with evidence of more positive racial climates in institutions with greater diversity).

[58] In contrast to the impact on underrepresented-minority students, the survey shows that the percentage of white students who feel disrespected at Riverside, Merced, UCLA, and Berkeley is 14 percent, 10 percent, 13 percent, and 9 percent, respectively, and does not appear to relate significantly to the diversity of the campus. The equivalent percentages for Asian-American students on these campuses are 7 percent, 5 percent, 13 percent, and 9 percent, respectively. *2015 Accountability Report*, Indicator 7.4.1 (statistics for Merced are from internal UC data sources).

"somewhat positive" campus climate at levels substantially above the system-wide average.[59] At UCLA and Berkeley, much lower percentages perceived a positive campus climate.[60] These perceptions of campus climate reinforce the conclusion that underrepresented minorities are disproportionately affected by declines in campus diversity.[61]

The data also show that underrepresented minorities "are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites/Asian Americans has gradually widened under Prop 209."[62] This suggests that there may be a compounding effect, with declines in diversity due to Proposition 209 making certain

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[59] At Riverside, 71 percent of African Americans perceived a positive campus climate, compared to 43 percent system-wide, and 86 percent of Latinos perceived a positive campus climate, compared to 69 percent systemwide. Internal UC Data. At Merced, the percentages were 74 percent for African Americans and 85 percent for Latinos. Internal UC Data.

[60] At UCLA, 29 percent of American Americans and 54 percent of Latinos reported a positive campus climate for people of color. At Berkeley, these figures were 23 percent and 55 percent. Internal UC Data.

[61] As above, perceptions of white and Asian-American students do not appear to relate significantly to the diversity of the campus. The proportion of white students who reported positive campus climates for people of color at Riverside, Merced, UCLA and Berkeley is 87 percent, 85 percent, 78 percent, and 72 percent. The parallel figures for Asian-American students are 79 percent, 84 percent, 74 percent, and 73 percent. Internal UC Data.

[62] *Misshaping the River* at 56; *see id.* at 71-83.

campuses less attractive to underrepresented minorities, who then decide to study elsewhere, even further diminishing diversity on those campuses.

III. THE NARROW-TAILORING ANALYSIS IS CONTEXT-SPECIFIC AND MUST TAKE INTO ACCOUNT COMPETING EDUCATIONAL INTERESTS

A. UC's Experience Provides Important Context Concerning the Sufficiency of Race-Neutral Alternatives

UC's experience provides sobering evidence about whether race-neutral alternatives are likely to have the same educational benefits as a race-conscious program. While UC continues to search for other viable approaches, the range of potential initiatives is constrained by the University's overall educational goals. *See Grutter*, 539 U.S. at 309 ("Narrow tailoring does not require . . . that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."); *id.* at 340 (a university need not adopt race-neutral alternatives that "would effectively sacrifice all other educational values, not to mention every other kind of diversity").

Independent of race, UC seeks to enroll "a student body that demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of backgrounds characteristic of California."[63] In addition to traditional indicators of

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[63] Board of Admissions and Relations with Schools, *Comprehensive Review in Freshman Admissions at the*

academic excellence like GPA and test scores, UC considers whether the applicant has demonstrated "[o]utstanding performance in one or more specific academic subject areas," whether the applicant has "[s]pecial talents, achievements, and awards in a particular field . . . experiences that demonstrate unusual promise for leadership . . . or other significant experiences or achievements that demonstrate the applicant's promise for contributing to the intellectual vitality of a campus."[64] UC also looks at the location of the applicant's secondary school and residence and assesses the "applicant's life experiences and special circumstances," taking into account experiences such as "disabilities, low family income, first generation to attend college, need to work, disadvantaged social or educational environment, difficult personal and family situations or circumstances, refugee status, or veteran status."[65]

The only race-neutral initiative suggested by Petitioner that UC has not already tried is to "uncap[] the Top 10% Law" applicable in Texas. Pet. Br. at 47. UC has not adopted a strict percentage admissions policy because doing so "would effectively sacrifice all other educational values," apart from class rank. *See Grutter*, 539 U.S. at 340. As this Court held in *Grutter*, such plans "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along *all*

University of California 50 (2010), http://senate.universityofcalifornia.edu/reports/HP_MGYreBOARS_CR_rpt.pdf.

[64] *Id.* at 53.

[65] *Id.*

the qualities valued by the university." *Id.* (emphasis added). The ELC program UC has adopted, by contrast, preserves UC's ability to conduct such individualized assessments. As explained above, however, that program has not yielded educational benefits comparable to UC's race-conscious program prior to Proposition 209.

B. This Court's Precedents Assess Narrow Tailoring with Careful Attention to Context

It has long been clear that race-conscious admissions programs are subject to the same heightened level of scrutiny as other racial classifications challenged under the Equal Protection Clause. *See Bakke*, 458 U.S. at 357 (opinion of Powell, J.); *Grutter*, 539 U.S. at 326. The Court's broader equal protection jurisprudence, therefore, provides "guidance" in applying scrutiny in this context. *Fisher*, 133 S. Ct. at 2418.

As *Grutter* affirmed, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. Given the importance of context, the precise contours of strict scrutiny may vary for different types of government interests and decision-makers while remaining consistent with broader equal-protection jurisprudence.

This Court has consistently defined narrow tailoring with reference to the dual concerns articulated in *Grutter*: whether a classification is "in fact motivated by illegitimate notions of racial inferiority or simple racial politics," *Johnson v.*

California, 543 U.S. 499, 506 (2005) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)), and whether "lawful alternative and less restrictive means could have been used," *Wygant*, 476 U.S. at 280 n.6. *See Grutter*, 539 U.S. at 326, 339-40 (employing these standards). How these guidelines are applied depends on context, which defines the government's interests and the viability of alternative measures. *Cf. Grutter*, 539 U.S. at 327 ("'in dealing with claims under broad provisions of the Constitution . . . it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts'" (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960)). The Court has, therefore, delved into the contextual particulars, for instance, of the construction industry, *Croson*, 488 U.S. at 507-08 (plurality opinion), the effects of teacher layoffs, *Wygant*, 476 U.S. at 279-84, requirements for Section 2 of the Voting Rights Act, *Shaw v. Hunt*, 517 U.S. 899, 908-909 (1996), and school busing plans, *Parents Involved*, 551 U.S. at 723-25.

C. A University's Constitutional Interests in Academic Freedom Should Inform the Court's Analysis of Race-Neutral Alternatives

This Court made clear in *Fisher* that it is appropriate for courts to "take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Fisher*, 133 S. Ct. at 2420. This guidance reflects the fact that "[t]he academic mission of a university is 'a special

concern of the First Amendment.'" *Id.* at 2418 (quoting *Grutter*, 539 U.S. at 312). Given these First Amendment interests, courts must take into account a university's overall educational goals when assessing whether a race-neutral initiative is in fact a viable alternative to a race-conscious plan.

It is beyond dispute that universities have a constitutional interest in setting their educational priorities and objectives. Because the classroom is "peculiarly the 'marketplace of ideas,'" *Keyishian*, 385 U.S. at 603, and because "expansive freedoms of speech and thought [are] associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329. In light of this constitutional interest and universities' expertise, courts have refrained from "substitut[ing] their own notions of sound educational policy for those of the school authorities." *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2988 (2010) (quoting *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)). This academic freedom extends to a university's ability to "make its own [educational] judgments as to . . . the selection of its student body." *Grutter*, 539 U.S. at 329 (*quoting Bakke*, 438 U.S. at 312 (Powell, J., concurring)).

Recognizing that "First Amendment interests give universities particular latitude in defining diversity" does not require courts to relax the exacting standard of judicial scrutiny required under the Equal Protection Clause. *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring). It does, however, require that courts take those First Amendment interests into account when applying strict scrutiny. Doing so

is not a departure from common constitutional analysis. To the contrary, this Court often balances multiple interests and enforces one constitutional right in light of the competing interests underlying another. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (reconciling the right to engage in political discourse with the right to vote); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (considering whether and when a criminal trial may be closed to the public to protect the defendant's right to a fair trial); *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (considering whether a defendant's testimony to support a motion to suppress may be admitted against him at trial without violating the Fifth Amendment).

Strict scrutiny is "no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. Rather, taking the university's judgment into consideration properly acknowledges that it has "invoke[d] a countervailing constitutional interest, that of the First Amendment." *Bakke*, 438 U.S. at 313 (Powell, J., concurring). Accounting for a university's authority to set its educational objectives does not amount to accepting the university's "good faith" in adopting a race-conscious admissions plan. *Cf. Fisher*, 133 S. Ct. at 2421. Instead, it places strict scrutiny of such plans properly within the relevant factual and constitutional context.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

CHARLES F. ROBINSON
KAREN J. PETRULAKIS
MARGARET L. WU
ELISABETH C. YAP
UNIVERSITY OF CALIFORNIA
OFFICE OF THE
GENERAL COUNSEL
1111 Franklin Street, 8th Fl.
Oakland, CA 94607

BRADLEY S. PHILLIPS
Counsel of Record
JOHN F. MULLER
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Brad.Phillips@mto.com

CHRISTOPHER M. PATTI
Chief Campus Counsel
OFFICE OF LEGAL AFFAIRS
200 California Hall, #1500
Berkeley, CA 94720
(510) 642-7122

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APPENDIX

APPENDIX

List of Amici Curiae

Janet Napolitano, President, University of California

Nicholas B. Dirks, Chancellor, Berkeley

Linda P.B. Katehi, Chancellor, Davis

Howard Gillman, Chancellor, Irvine

Gene D. Block, Chancellor, Los Angeles

Dorothy Leland, Chancellor, Merced

Kim A. Wilcox, Chancellor, Riverside

Pradeep K. Khosla, Chancellor, San Diego

Sam Hawgood, Chancellor, San Francisco

Henry T. Yang, Chancellor, Santa Barbara

George Blumenthal, Chancellor, Santa Cruz